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In the Supreme Court of the United States

MIKE HATCH,
Attorney General of Minnesota
Petitioner,

v.

CELLCO PARTNERSHIP,
DBA VERIZON WIRELESS, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

AMICI CURIAE BRIEF OF MICHIGAN, ALASKA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*

States have a fundamental interest in enacting laws that serve to protect their citizens. The issue presented here is the validity of Minnesota's wireless consumer protection act that ensures its citizens have notice and an opportunity to consent prior to certain changes in their wireless telephone contracts. The purpose of the law is to protect citizens from unconscionable contract provisions. The Minnesota law was enacted, in part, based on testimony provided at a legislative hearing where a citizen testified that the term of his cell phone contract was unilaterally changed from a month-to-month contract to a one-year contract without his knowledge. The Minnesota Legislature enacted the wireless consumer protection act to address these concerns among others.

The inherent right of the State to protect its citizens as Minnesota has done is one of those rights that has never been ceded to the federal government. The 10th Amendment of the Constitution provides that States retain those powers not expressly delegated to the federal government. This principle serves as the bedrock of our federalist system of government.

In addition to enacting the State law based on its inherent rights, Minnesota predicated its enactment of this law based on a clear and manifest intent as expressed by Congress when it set forth the federal–State regulatory scheme for the wireless telephone industry. The Federal Communications Act specifically preserves to the States the right to regulate certain terms and conditions of wireless contracts. Nevertheless, the Court of Appeals overturned the Minnesota statute. The States have a substantial interest in ensuring that their citizens are protected from unconscionable contract provisions and have express Congressional authority to provide protections for wireless telephone consumers. Amici States, therefore, have a substantial interest in this Court granting review.

SUMMARY OF ARGUMENT

The Constitution preserves to the States the authority to enact consumer protection laws as part of their historic police powers. Such laws can provide citizens a redress against unconscionable contract provisions and ensure that they have a bargaining position that prevents contracts of adhesion. States have traditionally exercised rights in this area. Minnesota enacted a law exercising this authority.[1] At public hearings, the Minnesota Legislature heard complaints from citizens regarding unilateral changes in their cell phone contracts.[2] In one example, a month-to-month contract was changed to a one-year contract without notice to the citizen. The contract also instituted an early termination fee if canceled prior to the one year. In an attempt to address problems of this nature, the Legislature enacted a statute that required companies to provide customers with a notice and consent provision for certain key terms of their cell phone contracts.

This is exactly the type of situation that States have traditionally regulated and one that the Constitution protects. The Court of Appeals nevertheless overturned the Minnesota statute.[3] The Court incorrectly found that the Minnesota statute was preempted by federal law. The Court of Appeals should have interpreted the State and federal statutes in a way that gave them *both* effect because there was no clear and manifest intent expressed by Congress to preempt this type of state law. Such an analysis would achieve the harmony between State and federal law that our Founders intended and the Tenth Amendment requires. The Court of Appeals ignored the States' role in enacting consumer protections of this nature and has therefore invaded sovereign State rights protected by the Tenth Amendment.

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[1] Minn. Stat. Ann. § 325F.695 (2006 Supp).

[2] C.A. App. 0333-36.

[3] Pet. App. 1a-15a (431 F.3d. 1077 (8th Cir. 2005)).

When Congress enacted § 332(c)(3)(A)[4] of the Federal Communications Act it expressly reserved to the States authority over certain terms and conditions of cell phone contracts. While Congress prohibited States from regulating "the entry of or the rates charged" for wireless telephone providers, the federal Act specifically preserved to the States the right to regulate the "other terms and conditions" of contracts between providers and consumers.[5]

Not only did Minnesota enact this law pursuant to its traditional and historic State police powers but also pursuant to the express authority preserved to it by Congress. Under the Court of Appeals' interpretation, the rate prohibition language of the federal Act preempted Minnesota's consumer protection efforts.[6] This was incorrect. The Minnesota statute, which required reasonable notice and consent prior to a unilateral change in the terms and conditions of a contract, does not conflict with the federal statute. The Court of Appeals' decision has thwarted the intent of Congress that specifically reserved consumer protection powers to the States and fails to respect the States' inherent and constitutional powers to protect their citizens.

Left untouched, the Court of Appeals' decision undermines these traditional and historic State police powers that are so important to our republic.

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[4] 47 U.S.C. § 332(c)(3)(A).

[5] 47 U.S.C. § 332(c)(3)(A).

[6] Minn. Stat. Ann. § 325F.695 (2006 Supp).

ARGUMENTS FOR GRANTING THE PETITION

A. The Constitution preserves the States' historic police powers.

The Constitution created a federal government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[7] The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it, "[t]he powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."[8]

Citing precedent dating back more than 120 years, this Court in *Gregory v. Ashcroft* held[9]:

> "The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' . . . 'Without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White, 74 U.S. 700, 7 Wall. 700, 725, 19 L. Ed.*

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[7] U. S. Const., Am. X.

[8] The Federalist No. 45, p. 292 (James Madison) (Clinton Rossiter Ed., 1961).

[9] *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1992)(Internal citations omitted).

227 (1869), quoting *Lane County v. Oregon, 74 U.S. 71, 7 Wall. 71, 76, 19 L. Ed. 101 (1869).*

This Court has repeatedly acknowledged its overriding respect for States' rights preserved by the 10th Amendment. In *Wisconsin Public Intervenor* the Court set forth the starting point for a preemption analysis when it observed, "[w]hen considering pre-emption, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[10]

B. States must be vigilant in protecting consumers against unconscionable contracts.

Imagine entering into a month-to-month cell phone contract and subsequently calling to cancel it because you found another provider that better met your needs. You were told that your contract had been extended into a one-year contract. You were advised that the only way you could cancel would be to pay a $150 early termination fee. And, to make matters worse, if you did not pay the early termination fee, the matter would be referred to a collection bureau and become part of your permanent credit history. This is exactly the situation that the Minnesota Legislature has tried to address.

Without any means of redress, wireless telephone companies can routinely trap consumers into contracts using old fashioned "bait and switch" tactics. They could set incredibly low rates that have unlimited usage only to switch such terms and conditions at a later time, imposing the early termination fees as well. This is a situation that calls for State oversight.

Misuse of bargaining power leads to unconscionable contracts and States must be able to legislate against such matters.[11]

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[10] *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[11] See e.g. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

Consumer protection law is a field traditionally regulated by the States.[12] Indeed, all fifty States and the District of Columbia have enacted consumer protection statutes designed to protect consumers from unfair, deceptive, and abusive business practices in the marketplace.[13]

Though the right of citizens to contract is well established, this right is not absolute. Fundamental with the private right to contract is the public right to regulate in the common interest to prevent one party from exercising its freedom of contract to work the public harm.

The Minnesota Legislature enacted the consumer protections for wireless customers act in 2004.[14] Minnesota's right to enact laws that protect its consumers is well established. The controversy that this case presents is whether the notice and consent provisions of the State statute are a regulation of the "rates charged" by cell phone providers and therefore preempted by federal law. As fully explained in Minnesota's petition, the Minnesota Legislature enacted the law to regulate contracts, not rates. As the District recognized below, this is plainly evident from an examination of the law itself[15]:

> [The Minnesota law] manifests basic principles of contract law. Nothing in the law prevents wireless providers from charging any rate the market will bear. Nothing in the law caps wireless rates. Similarly, the law does not dictates [sic] whether a particular billing method is unreasonable. *Cf.* *In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 1999 WL 1062835, at P 23 (F.C.C. November 18, 1999) (FCC finding that lawsuits challenging the practice of billing in whole minute

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[12] See e.g. *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990).

[13] National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, Section 1.1, (6th Ed. 2004).

[14] Minn. Stat. Ann. § 325F.695 (2006 Supp).

[15] Pet. App. at 25a (2004 U.S. Dist. LEXIS 18464, 12-13 (D. Minn. 2004)).

> increments constituted such rate regulation). Instead, the law requires notice and informed consent to contract changes. As the FCC has observed, state law claims relating to the "disclosure of rates and rate practices are not generally preempted under Section 332." 14 F.C.C.R. 19898 at P 23. [The Minnesota law] requires wireless providers to disclose rates, to obtain consent to rate increases, and to honor contractual obligations. [The Minnesota law] also prohibits changes to established contracts absent informed consent to those changes.

No industry should, in the name of freedom to contract, be allowed to eviscerate the rights of the people to enact laws that extend such basic protections.

These consumer protection statutes are exactly the kind of "historic police powers of the States" that were recognized in *Florida Lime & Avocado Growers v. Paul.*[16]

The requisite review to determine if any given contract complies with State law is generally a factual matter properly left to the States. The Court of Appeals' decision, if allowed to stand, will invade the province of the States to determine whether certain contract provisions are unconscionable. The Court of Appeals' decision wholly ignores the important role that consumer protection statutes play in preventing and deterring unfair practices in the marketplace.

The necessity to preserve States' rights in contractual matters is further evidenced when one observes the long history of voiding contracts of adhesion.

Black's Law Dictionary defines an "adhesion contract" as[17]:

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[16] *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 144-146 (1963).

[17] Black's Law Dictionary (5th Ed. 1979).

> Standardized contract form offered to consumers of goods and services on essentially [a] "take it or leave it" basis without affording [the] consumer realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain desired product or services except by acquiescing in form contract. [A] distinctive feature of adhesion contract is that [the] weaker party has no realistic choice as to its terms.

States are well within their constitutionally protected rights to enact laws that provide consumer protection against unconscionable provisions in cell phone contracts. The two parties are in unequal bargaining positions as evidenced, in part, by the fact that the contracts are offered on a "take it or leave it" basis. Because States need to protect their citizens against unilateral and unconscionable contract amendments, it is important for this Court to review the Court of Appeals' decision.

C. The Minnesota statute furthers the goals and policies of the federal Act.

Congress expressly permitted the States to regulate the terms and conditions of cell phone contracts. The Act and its legislative history set forth a relatively decentralized scheme that preserves a broad role for State regulation. The Act states, "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[18]

The legislative history makes this even more clear, as stated in the House Report[19]:

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[18] 47 U.S.C. § 332(c)(3)(A).

[19] H.R. Rep. No. 103-111, 103rd Cong. 1st Sess. (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News, 378, 588 (emphasis added).

> Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on private land mobile service or commercial mobile services; this paragraph further stipulates that nothing here shall preclude a state from regulating the other terms and conditions of commercial mobile services. *It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services.* By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters* . . . or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

The Minnesota statute states, in part[20]:

> A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. . . . If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

The Minnesota statute is an example of exactly the type of oversight that Congress intended for the States to maintain. The Court of Appeals, however, overturned the Minnesota statute, in part, because it concluded that the 60-day notice provision impacted rates.

The Court in *Cellular Telecomm's Indus. Ass'n. v. FCC*,[21] rejected similar arguments in its decision upholding a Texas

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[20] Minn. Stat. Ann. § 325F.695(3) (2006 Supp).

[21] *Cellular Telecomm's Indus. Ass'n. v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999).

statute requiring providers to make contributions to a state fund, by stating, in part[22]:

> Here the idea is that the Texas contribution requirements are impermissible rate regulation because they increase the wireless service provider's costs of doing business in the state and thus impact the rates charged to customers. One might say the same about local siting laws or state consumer protection laws. They too increase the cost of doing business. Yet a House Committee cited these laws as examples of the variety of *permissible* regulation of the "other terms and conditions." The Commission offered other such examples, including some drawn from its previous decisions. To equate state action that may increase the cost of doing business with rate regulation would, the Commission reasonably concluded, forbid nearly all forms of state regulation, a result at odds with the "other terms and conditions" portion of the first sentence.

The Court of Appeals in the present case should have applied the same analysis. The potential impact a statute might have on rates should not invalidate the State statute. The ability to regulate unilateral changes to contracts is exactly the type of consumer protection measure that Congress intended for the States to regulate irrespective of an indirect affect on rates, revenues or costs.[23]

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[22] *Cellular Telecomm,* 168 F.3d at 1336 (internal citation omitted).

[23] *Cellular Telecomm,* 168 F.3d 1332.

D. Federal preemption law respects historic State police powers.

The long history of federal preemption law is reflected in Justice Thomas's concurrence in *Bates v. Dow Agrosciences LLC*[24]:

> Today's decision thus comports with this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption. This reluctance reflects that pre-emption analysis is not "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," but an inquiry into whether the ordinary meanings of state and federal law conflict.

The Court of Appeals acknowledged[25] that it was bound by this Court's decision in *Medtronic, Inc. v. Lohr*[26] and that the scope of an express preemption clause "must rest primarily on 'a fair understanding of *congressional purpose*.'"[27] Quoting *Medtronic,* the Court went on to acknowledge that it must be presumed that Congress did not intend preemption of historic police powers of the States "unless that was [its] clear and manifest purpose."[28] While correctly citing the relevant inquiry, the Court did not apply this analysis to the Minnesota statute. The Court reasoned that because a 60-day notice *might* delay a rate change, it was therefore tantamount to rate regulation and must be preempted. That is where the Court erred. The federal Act does not provide a "clear and manifest" preemption of the Minnesota statute.

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[24] *Bates v. Dow Agrosciences, LLC,* 544 U.S. 431; 125 S. Ct. 1788, 1807; (2005) (internal citations omitted) (Thomas, J., concurring in the judgment in part and dissenting in part).

[25] Pet. App. at 5a (431 F.3d at 1080).

[26] *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996).

[27] *Medtronic,* 518 U.S. at 485–486.

[28] Pet. App. at 5a (431 F.3d at 1080).

To the contrary, the federal Act preserves to the States these traditional consumer protections. The Court's inquiry should be limited to the relevant statutory provisions and legislative history, not a circuitous rationale. The Court went to some length rationalizing the impact such a notice and consent provision might have on rates. Such an inquiry was incorrect. The Court should have looked at the federal statute and its legislative history and stopped there. If there was any doubt as to the Congressional intent (amici does not think there was) then the Court must uphold the state statute. Instead the Court went further in its analysis to fashion a finding of implied preemption. The Court applied the wrong analysis.

This Court has enunciated the proper review in such a case many times. This limited scope of review was recently confirmed by this Court in *Bates v. Dow*[29]:

> [W]e would nevertheless have a duty to accept the reading that disfavors pre-emption. "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention "'clear and manifest.'"

The Court of Appeals' inquiry should have been limited to whether Congress clearly and manifestly intended to preempt laws such as the Minnesota statute.[30] The goals and policies of the federal Act include permitting States to regulate the "terms and conditions" of cell phone contracts. The enforcement of the Minnesota statute would give the State's citizens the protections the Minnesota Legislature thought were needed. The Court of

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[29] *Bates v. Dow*, 544 U.S. 431, ___; 125 S. Ct. at 1801 (internal citation and quotation marks omitted).

[30] *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 685 (1996) and *Volt Info. Scis. v. Bd of Trs.*, 489 U.S. 468, 479 (1989).

Appeals' decision denies these citizens these legitimate protections and ignores the clearly expressed state authority that the Congress intended.

E. The Minnesota consumer protection statute is not rate regulation under 47 U.S.C. § 332(c)(3)(A).

The Court of Appeals concluded that subdivision 3 of the Minnesota statute "effectively" regulated the rates of cell phone service and was therefore preempted by § 332(c)(3)(A).

Subdivision 3 of the Minnesota statute states[31]:

> **Provider-initiated substantive change.** A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Subdivision 1 (d) defines "substantive change" as follows[32]:

> "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that

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[31] Minn. Stat. Ann. § 325F.695(3) (2006 Supp).

[32] Minn. Stat. Ann. § 325F.695(1)(d) (2006 Supp).

> includes only the actual amount of any increase in taxes or fees, which the government requires the provider to impose upon the customer, is not a substantive change for purposes of this section.

The Court of Appeals concluded that the State statute may *affect* rates, stating[33]:

> A waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to "opt-in," has a clear and direct effect on rates. We thus conclude that subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A).

The Court erred in its conclusion. The federal statute, 47 U.S.C. § 332(c)(3)(A), does not say that any state law that *affects* rates is preempted. It only preempts a regulation of "rates charged."[34] Minnesota does not set cell phone rates. It does not review them. It simply provides consumers with an opportunity to assent to increases proposed by the provider prior to their taking effect, otherwise the original terms of the contract apply. The Minnesota statute is a fundamental consumer protection assuring that consumers get the deal they bargained for.[35]

The overly broad meaning given by the Court of Appeals to "rates charged" in § 332 contrasts with many Federal Communications Commission (FCC) and court decisions construing the same language. The Court of Appeals refers to several FCC decisions in analyzing the tension between the rate regulation prohibition and the States' consumer protection authority of the states.

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[33] Pet. App. at 12a (431 F.3d at 1083).

[34] 47 U.S.C. § 332(c)(3)(A).

[35] It should be noted that Minn. Stat. Ann. § 325F.695 (1)(d) also governs changes in the length of the contract term.

The Court of Appeals relied on *In Pet. of Hawaii Pub Util Comm'n*,[36] for the proposition that even a 30-day review was "rate regulation."[37] The Minnesota statute is distinguishable from the Hawaii case in that there is no *review* of the rates taking place by the State of Minnesota. It is the consumer that is given the opportunity to review the proposed change under the Minnesota law, not State government. Furthermore, the *Hawaii* proceeding was a petition under § 332(c)(3)(B) of the federal Act, which permits States to retain their rate regulatory authority as specifically provided by that subsection. It was not a case deciding whether § 332(c)(3)(A) preempted Hawaii law. Contrary to the Court of Appeals' broad application of the inopposite FCC ruling the agency's statement concluded[38]:

> Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is present by the HPUC Petition and related comments. Thus, we will *not* expound at any length on this matter.

The FCC went on to say[39]:

> Complaint proceedings may concern carrier practices, separate and apart from their rates. In consequence, it is conceivable that matters might arise under state complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit Hawaii to continue to conduct proceedings on complaints

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[36] *In Pet. of Hawaii Pub Util Comm'n*, 10 F.C.C.R. 7872 (1995)(emphasis added).

[37] Pet. App. at 7a (431 F.3d at 1080-1081).

[38] *In Pet. of Hawaii*, 10 F.C.C.R. at 7883 (¶ 55) (emphasis added).

[39] *In Pet. of Hawaii*, 10 F.C.C.R. at 7883 (¶ 56).

> concerning such matters, to the extent that state law provides for such proceedings.

The above language acknowledges that even the FCC recognized that § 332(c)(3)(A)'s "other terms and conditions" language allows for state consumer protections laws. The language of the federal Act requires the broad reading of "other terms and conditions" intended by Congress, not the narrow reading given by the Court of Appeals.

Such a finding was also supported in *In the Matter of Southwestern Bell Mobile Systems, Inc.*[40] In that case, the FCC determined that the wireless industry was not exempt from the application of state contract and consumer fraud laws even if they related to the disclosure of rates and rate practices. *Southwestern Bell* rejected the notion that all claims that may be related to rates are necessarily preempted by the Act[41]:

> [T]he legislative history of Section 332 clarifies that billing information, practices and disputes – all of which might be regulated by state contract or consumer fraud laws – fall within "other terms and conditions" which states are allowed to regulate. Thus, state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332.

In yet another case, the FCC rejected the claim that various state consumer, contract and tort claims were forms of impermissible rate regulation in its decision *In the Matter of Wireless Consumers Alliance*, the agency said[42]:

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[40] *In the Matter of Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19898 (1999).

[41] *In the Matter of Southwestern Bell*, 14 F.C.C.R. at 19908 (¶ 23).

[42] *In the Matter of Wireless Consumers Alliance*, 15 F.C.C.R. 17021, 17035–17036 (2000) (¶ 27).

> In short, we reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service. A carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service. Conversely, a carrier that is charging a "reasonable rate" for its services may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other material terms, conditions, or limitations on the service it is providing. We thus do not agree with those commenters who allege that, for consumer protection claims, any damage award or damage calculation, including any refund or rebate, is necessarily a ruling on the reasonableness of the price or the functional equivalent of a retroactive rate adjustment.

The Court of Appeals' incorrect construction of § 332's prohibition of the regulation of "rates charged" also differs from the approach taken by other courts. In *Brown v. Washington/Baltimore Cellular, Inc.*,[43] the court found that state regulation of late fees was not preempted by § 332(c)(3)(A). The court said[44]:

> For example, a claim of false advertising could lead to an increased obligation to notify customers of charges, which could in turn lead to an increase in rates. Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves.

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[43] *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp.2d 421 (D. Md. 2000).

[44] *Brown*, 109 F. Supp.2d at 423.

The Court of Appeals below concluded that if a State's law provisions "affect" rates it must be preempted under § 332(c)(3)A). This is contrary to what the Court in *Brown* said, "Congress did not preempt all claims that would *influence* rates."[45] The Court in *Brown* accurately reflects the plain language of the federal Act as well as its legislative history. A finding that a State law may *affect* the "rates charged" is not prohibited under the federal Act.

In *Fedor v. Cingular Wireless Corp.*,[46] the court held that a challenge to the billing practice in the way the company billed for minutes used was not preempted by the "rates charged" prohibition of the federal Act. The court stated[47]:

> In other words, these claims address not the rates themselves, but the conduct of [the company] in failing to adhere to those rates. That is precisely the type of state law contract and tort claims that are preserved for the states under *§ 332* as the "terms and conditions" of commercial mobile services.

Finally, in *Iowa v. U.S. Cellular Corp.*,[48] the court in upholding consumer protection claims, noted that "[t]he claims do not attempt to regulate rates, they merely require [company] to fairly and adequately disclose its contract terms to consumers and to refrain from unjust and oppressive business practices."[49]

The cases cited above demonstrate that the Minnesota statute should not be preempted. The State of Minnesota does not regulate rates and does not review rates. The Minnesota statute simply requires providers to give fair and meaningful disclosure

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[45] *Brown*, 109 F. Supp.2d at 423.

[46] *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004).

[47] *Fedor*, 355 F.3d at 1074.

[48] *Iowa v. U.S. Cellular Corp.*, No. 90197 (S.D. Iowa August 7, 2000) (2000 WL33915909).

[49] *Iowa v. U.S. Cellular*, No. 90197, 2000 WL39915909 at 11.

of substantive changes in contracts to its customers. As previously referenced, the District Court said[50]:

> Nothing in the law prevents wireless providers from charging any rate the market will bear. Nothing in the law caps wireless rates. . . . Instead, the law requires notice and informed consent to contract changes.

Section 332(c)(3)(A) of the federal Act does not preempt the Minnesota statute. The federal Act was not intended to supplant State law such as the Minnesota law which does not regulate "rates charged." The Minnesota Legislature has simply done what it was authorized to do under 47 U.S.C. § 332(c)(3)(A).

CONCLUSION

The Court of Appeals' decision casts a far-reaching net over the terms of a cell phone contract. This decision makes it impossible for any State to require fundamental notice and consent prior to unilateral substantive changes to cell phone service contracts. Such statutory authority is reserved to the States by the Constitution unless preempted by a "clear and manifest" intent expressed by Congress. In this instance, Congress was careful to preserve such authority to the States.

The contract notice and consent provisions of the Minnesota statute give the consumer the right to enforce the original terms of the contract. If the consumer does not have this fundamental protection afforded by the Minnesota statute, cell phone providers can increase charges to customers or extend their contract term without notice. This would result in an impermissible imbalance in the contractual relationship and violate 600 years of black letter contract law. Unilateral changes to contracts result in contracts of adhesion. Such contracts are voidable under traditional State consumer protection principles, and nothing in the federal statute

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[50] Pet. App. at 25a (2004 U.S. Dist. LEXIS 18464, 12-13).

undermines that State authority. The Minnesota statute simply allows consumers an opportunity to get what they bargained for.

Congress has not preempted State authority to protect its citizens regarding traditional consumer protections. Congress went to great lengths to preserve these rights of the States and its intention should not be undermined by a preemption claim.

James Madison agonized over "the supposition that the operation of the federal government will *by degrees* prove fatal to the State governments."[51] We submit that this Court should review the case below to assure that the Court of Appeals decision does not erode the State authority that our Founders so carefully cautioned against.

This Court should grant certiorari.

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[51] The Federalist No. 45, p. 289 (emphasis added).